Supreme Court of the United States.

DECEMBER TERM, 1869.

No. 151.

JOHN EDGAR THOMPSON ET AL., COMPLAINANTS,

vs.

THE UNION PACIFIC RAILWAY COMPANY, EASTERN DIVISION, ET AL.

SUPPLEMENTAL BRIEF.

E. R. HOAR,
Of Counsel for Complainants.

Judd & Detweiler, Printers, Corner Penn. Avenue and 11th street.

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It is agreed for the purposes of this suit, that the sole question presented by the record and to be considered by the Court, is, whether, under the laws of Congress, and the statutes and resolves of Kansas set forth therein, the property of the Union Pacific Railway Company, Eastern Division, in the bill specified, is liable to be taxed for State, county, and municipal purposes. The facts alleged in the bill and necessary to raise this question being admitted to be true, all other questions which might affect the adjudication of this sole question are waived.

The exact question before this Court directly concerns only the right of taxation to be exercised in Kansas upon the property of the Union Pacific Railway Company, Eastern Division; but it indirectly concerns all the corporations constituting the great national avenue and line of communication known as the Pacific Railroad; and to arrive at a correct conclusion, it seems

to us necessary to ask the attention of the Court to the relations which the whole of this great enterprise, executed under the authority of Congress, sustains to objects of national concern; to consider in what manner and to what extent the objects aimed at and the methods devised for their accomplishment, are within the just powers of the National Government; and to ascertain the necessary connection of the several parts of it to each other.

The Union Pacific Railroad Company, Eastern Division, is a corporation originally chartered by the territorial legislature of Kansas at a time when that territory included a considerable part of what is now the territory of Colorado, and authorized to construct a railroad to the western boundary of the territory. By far the larger part of the land over which it was proposed to build the railroad belonged to the public domain of the United States. It was not built, and the corporation possessed no resources adequate to its completion, until the enactment of the acts of Congress of 1862 and 1864. Those acts provided for the establishment of a continuous line of railroad from the Missouri river to the Pacific Ocean.

The general scheme of this great national work was to provide for the construction of a railroad through the territories of the United States by a corporation chartered for that purpose, and deriving its existence and all its powers from the acts of Congress, connecting at either end, where it reached one of the States of the Union, with roads chartered under State authority. But it proceeded to give to these State corporations certain additional powers and functions, to endow them with large grants and privileges, conferred upon fundamental conditions, the acceptance of which incorporated them into the general scheme for the construction of this national avenue of communication, and was essential to its efficiency and completeness.

The great question which lies at the foundation of the whole discussion which this case calls for, seems to me to be best approached by considering it, first, in its relation to the Union Pacific Railroad, established by Congress through the Territories of the Union, and afterward seeing how far the principles established in relation to that road are applicable to one of its

branches established within a State, and especially to the road in Kansas, the defendant in this suit.

I shall undertake to establish these propositions:

I. That Congress has the power, under the Constitution, to establish a railroad through the national territories; that this power may be derived—

From the power "to make all needful rules and regulations respecting the territory of the United States;"

From the power "to regulate commerce among the several States and with the Indian tribes;"

From the power "to establish post offices and post roads;"

From the power "to declare war, and to raise and support armies;" and

From the power to "protect each of the States in the Union against invasion and against domestic violence."

Constitution of the U. S., Art. I, sec. 8; Art. IV, sec. 4.

II. Under the power given to Congress by the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof," the creation of a railroad corporation is a proper and suitable means of executing the power to establish a railroad, and is, therefore, warranted by the Constitution.

Const. of the U. S., Art. I, sec. 8.

McCulloch *vs.* State of Maryland, 4 Wheat, 316.

III. That Congress would unquestionably have the power, by express enactment, to exempt the franchise of such a railroad corporation, and such of its property as is essential to its maintenance and successful operation, from taxation by a territorial government, or by any State formed within the national domain and admitted into the Union.

IV. That a like exemption from taxation must exist by necessary implication where taxation would affect the successful operation of a corporation established as a necessary or proper means of executing the powers of Congress for the accomplishment of the objects, and the assertion of the authority, of the National Government; or would enable a territorial or State government to destroy, or materially interfere with, the means selected by Congress for performing the proper functions of the Government of the United States.

V. That it is apparent from the whole scope of the statutes of 1862 and 1864, that Congress designed the Union Pacific railroad to be a national work, to be established, endowed, maintained and operated primarily for national objects; that to permit to a territorial or State government the exercise of the right to tax the franchise of the company, the road-bed, or any other of its property necessary for its operation and for the accomplishment of the objects of its creation, would yield to those governments the power to control, impair, and, in effect, to destroy the road, and, therefore, that such taxation is, by necessary implication, forbidden.

VI. It was within the constitutional power of Congress to extend its railroad established within the territories through the States so as to make a continuous route from the Mississippi river to the Pacific Ocean.

VII. If any question could be made of the general power of Congress thus to extend a road over the territory of a State for national objects, and as a part of a national work, without the consent of the State, or to confer upon a corporation created by or existing within a State new and additional powers and privileges, and to require of it additional duties to those imposed by its charter, without the consent of the State or the corporation, there should be no doubt that, with the consent of the State and the corporation, such action by Congress is valid and lawful.

VIII. The acts of Congress of 1862 and 1864 made the several branches of the Pacific Railroad within the States, including the defendant corporation within the State of Kansas,

substantive and essential parts of the whole plan, and impressed upon them the same character of a national work constructed largely from the national resources in land and money, and thereby included them in the same exemption from State or municipal control and taxation as the Union Pacific Railroad.

IX. The arrangement between the United States Governernment and the Union Pacific Railway Company, Eastern Division, was made not only with the consent, but upon the urgent request, of the State of Kansas, as shown by the acts and resolves contained in the record; and the acts of Congress of 1862 and 1864, in connection with the acts and resolves of the State, constituted a contract involving an exemption from the operation of any legislation such as the law of Kansas subsequently passed providing for the taxation of railroads in that State creates. That law cannot, therefore, be construed as applicable to the defendant corporation, because its effect would thus be to impair the obligation of a contract.

E. R. Hoar,
Of Counsel for Complainants.

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IN THE SUPREME COURT

OF THE

UNITED STATES.

J. EDGAR THOMPSON AND OTHERS,

COMPLAINANTS,

vs.

UNION PACIFIC RAILWAY COMPANY, E. D.,
JAMES BLOOD, JOHN M. FUNK AND WM. COY,

DEFENDANTS.

No. 151.

Brief for Defendants, James Blood, John M. Funk, and Wm. Coy, Treasurers of Douglas, Wyandotte and Jefferson Counties.

IN THE SUPREME COURT
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J. EDGAR THOMPSON, and others, Complainants,
vs.
UNION PACIFIC RAILWAY CO., JAMES BLOOD, JOHN M. FUNK, AND WILLIAM COY, Defendants. } No. 151.

Brief for Defendants, James Blood, John M. Funk, and Wm. Coy, Treasurers of Douglas, Wyandotte, and Jefferson Counties.

The sole question to be answered by the Court is that propounded by the Circuit Court for the district of Kansas in its certificate of division of opinion of the judges of that court, to wit: "Whether the property of the Railway Company, defendant in this case, described in the bill, was subject to the tax which the Statutes of Kansas authorized to be levied on all other property, not specially exempted, for State, county and municipal purposes."

Most of the general principles applicable to this case have often been determined in this Court, and in the recent cases, *Society for Savings vs. Coite*, 6 *Wallace* 594; *Provident Institution vs. Massachusetts*, *do.* 611; *Hamilton Company vs. Massachusetts*, *do.* 632, they have received renewed affirmation.

Nearly all of these principles flow from the reasoning of Chief Justice Marshall in *McCulloch vs. Maryland*, 4 *Wheaton*, 429. We merely place in order these primary rules, resting as we believe they do, on undebatable ground.

1st. The right of the State to tax property, trades, avocations, and franchises, within its bounds, is a sov-

ereign right, and not at all derived from the Federal Government.

2nd. This power of the state to tax extends to all objects, except the means and instruments of the General Government, within the sovereign power of the state.

3d. Unless exempted in terms which amount to a contract, the privileges and franchises of a private corporation are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the state.

4th. When the state creates a corporation and authorizes it to hold and use property, its right to tax the corporate property need not be reserved, it inheres and remains in the state.

These are the great lights which must guide the inquiry. It may be as well to note in passing, that it is admitted both by bill and answer, that the Railway Company, defendant herein, is a corporation created by the laws of Kansas, and deriving its corporate powers from the sovereignty of Kansas.

It devolves, then, upon the complainants to show that the property of this corporation is relieved from bearing its proportion of the public burden.

That the corporation was once subject to the state that gave it life and being and still protects it, is clear. By what process it now becomes independent of the state, so far as bearing its proper share of taxation is involved, must be affirmatively and clearly shown. *P. & W. R. R. Co.. vs. Maryland, 10 Howard, 393.* The taxing power of the state is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms. *do.*

To maintain their position, the complainants, who, considering the large amount of their stock as shown in

the bill to all intents and purposes must be considered as acting for the Railway Company, rely upon two propositions:

1st. That Kansas by her resolves, as shown in the agreed statement of facts, has relinquished its right to tax the property of the corporation, and,

2d. That in fact, the railway corporation with its franchises and property, is a "means or instrument" of the General Government, whereby it carries on its operations.

The first proposition is untenable, because,

1st. Not one of the resolves relied on had any reference to the matter of taxation. From the principles already cited, it is certain that a release from taxation must have been in contemplation when the resolve relied on was made. These resolves had relation to an entirely different subject. It is indeed true that Kansas was desirous that railroads should be built within her borders, else the act of incorporating the Railway Company would never have been granted. It is also equally true that these resolves were the expression of the legislative sentiment on the subject of grants of land and other subsidies to the roads therein named. But they will be searched in vain for those "clear and unambiguous terms" releasing the right of the State to tax the property of the railway corporation, which are held to be so requisite by Chief Justice Taney in P. & W. R. R. Co. *vs.* Maryland. To ask Congress to assist in the building of railroads in Kansas, by grants of land and loans of credit of the General Government, is one thing; to release its right of taxing these railroads is quite another. The two subjects have no legal relation to each other, and legislative action on the one, cannot be said to involve a consideration of the other.

2d. These resolves do not purport to make a contract. They do not, in terms, nor by implication, propose either to the Railway Company, or to the General Government, that the State will, in consideration of a loan to the Railway Company, relinquish its undoubted right to tax the property of the Company.

There is no proposition advanced upon the one side, and accepted on the other—no consideration suggested —no subject matter and no *consent of minds*. It would be a violent interpretation of these resolves to say that they, in fact, proposed to Congress a release of the sovereignty of Kansas over the corporate property of the Railway Company, on condition Congress would assist, with a generous loan, the Company to build its road.

Certainly the last and chief element in a contract, "consent of mind," is wanting. *McGhee vs. Mathis, 4 Wallace, 143.*

Commenting on this quite too common attempt to wrest valuable exemptions and franchises from acts passed by the legislature with a far different purport and design, Justice Campbell in his dissenting opinion, in State Bank of Ohio *vs.* Knoop, 16 Howard, 376, quotes from the Supreme Court of Pennsylvania, 7 Harris, 144, as follows: "If acts of incorporation are to be construed so as to make them imply grants, privileges, immunities and exemptions, which are not expressly given, every company of adventurers may carry what they wish, without letting the legislature know their designs. Charters would be framed in doubtful or ambiguous language, on purpose to deceive those who grant them; and laws which seem perfectly harmless on their face, and which plain men would suppose to mean no more than what they say, might be converted into engines of infinite mischief. There is no safety to the public inter-

est, except in the rule that declares that privileges not expressly granted, are withheld." For a still stronger case, as to effect of a legislative memorial, see Ross *vs.* Supervisors, &c., 12 Wis., 38.

If these "resolves" make a binding contract on the part of Kansas, exempting the property in question from taxation, it is one made without the knowledge or intention of the legislature.

3d. But, even were the elements of a contract found, yet it would not bind the State, since the legislature had not the power to make such a contract. It is true that there are cases which seem to hold that the power of exempting certain property from taxation, is one vested in the State Legislature. *State Bank of Ohio vs. Knoop.* Yet the case of Ohio Life Insurance and Trust Company *vs.* Debolt, 16 Howard, 416, as emphatically holds that this power is not possessed by the legislature unless it has been conferred upon it by the constitution of the State.

The constitution of the State of Kansas, in section one of article eleven, defines the duty of the legislature in the levying and assessment of taxes, and also provides for such exemptions as it deemed best. That section is as follows: "The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for State, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes; and personal property to the amount of at least two hundred dollars for each family, shall be exempt from taxation."

Having in this fundamental way indicated what property should be exempt from taxation, we submit that the maxim *expressio unius exclusio alterius* applies, and that the legislature has no power to exempt other property than that mentioned in this section. Section

twenty of the Bill of Rights of the Constitution reads as follows:

"This enumeration of rights shall not be construed to impair or deny others retained by the people; *and all powers not herein delegated, remain with the people.*"

We insist that this power, of exemption is one disposed of in the constitution and was not delegated to the legislature, except as to the amount of personal property that might be exempted to each family.

Moreover, this clause of the constitution has received judicial construction in the state. In the State ex rel Attorney General *vs.* Commissioners of Leavenworth County, 2 Kansas, 61, this section one came under notice. In that case it was sought to compel Leavenworth county, to levy a tax to pay a tax, in which the county as a whole was delinquent while Kansas was a territory.

The court commenting on this section, says: "To comply with this provision, taxes must be assessed *uniformly* upon the property of all parts of the state; and while it may be quite consistent with justice and with the constitutional provision, that persons owing taxes imposed by the laws of 1860, should be compelled to pay them, to collect such taxes of others because they now reside or have property within the same county, unless the whole State is subject to the same burthen, seems manifestly consistent with neither."

In other words it would be exempting property elsewhere in the State from taxation, and this the legislature cannot do.

Still more emphatic is the Supreme Court of Kansas in Blue Jacket *vs.* Commissioners of Johnson county and others, 3 Kansas 299, in affirming that "All property in the State, except such as is *specifically exempted* by the State constitution, and such as is exempt under the fed-

eral constitution and the laws and treaties made in pursuance thereof, is subject to taxation."

4th. But in any case it is not competent for the legislature to grant a privilege or immunity which a succeeding legislature may not repeal, alter, or modify. In section two of the Bill of Rights of the Constitution of Kansas, it is declared:

"No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked, or repealed by the same body."

If then, these resolves can be tortured into an exemption from taxation of the property of the Railway Company, yet they must be held to be repealed and revoked by the subsequent act of the legislature in passing laws taxing this very property, for it is one of the facts agreed to by the parties as shown in the record, that the taxes have been laid and assessed in conformity with the Statutes of Kansas. If any immunity from taxation can be wrung from these resolves, it is equally certain that that immunity has been withdrawn; and of this withdrawal there can be no complaint, since the privilege was received attended with the knowledge that it was liable to revocation.

SECOND.

We are now prepared to consider the proposition that, by virtue of certain loans, made to the Union Pacific Railway Company, Eastern Division, by the United States, its property has become a "means" used by the General Government to carry on its operations, and hence exempt from State taxation.

It is to be observed that this is not a claim at all, set up by the United States. The General Government is not in court offering any complaint of the State action,

but certain of the large stockholders of the Railway Company, defendant, bring this suit, claiming that by virtue of the relations between the Railway Company and the General Government, a right has arisen in behalf of the complainants, exempting their property from taxation.

It would seem that the axioms touching this question of taxation, already alluded to, would at once decide the case against the complainants. Their claim rests not on compact or agreement, but an "inference": they draw their asserted right from an "implication," and screen their property from its share of the public burden under the shield of a "deduction."

A right so essential to the State, a privilege so valuable to the complainants, cannot be gained or lost in that manner.

1st. The property in question does not belong to the United States. The agreed statement in the case admits it to be the property of the defendant, the Union Pacific Railway Company, Eastern Division. It is described in the complaint, and admitted in the answers, as the property of the Railway Company; and the very point certified to this court is whether the "property" of this Railway Company is liable to taxation.

Failing to show any release of this property from taxation—any compact or contract to that effect on the part of the State—it would seem as if there was no room left for argument.

It will be observed that by the agreed statement of facts, no claim is set up that a certain degree of taxation, the Company can bear and fulfill its duties to the General Government, and beyond that, a tax would be illegal, because it would embarrass the Company in meeting its obligations to the United States.

Indeed, such an inquiry was declared in the great authority of McCulloch *vs.* Maryland, to be "unfit for the judicial department." If the State has the right to tax at all, its action cannot be inquired into here.

If the complainants can maintain their suit at all, it must be on the broad ground that the property of the Railway Company is totally exempt from State taxation.

And this we understand to be the claim as presented to the court, though the allegations in the bill are that the taxes laid are so great that the Company cannot make money for its stockholders, the complainants, perform its obligations to the United States, and meet the requirements of the State. Yet another allegation is that the General Government is a part owner of the property of this railway corporation.

The complainants undoubtedly will argue that this allegation is true, from the interest the United States has in the property in question. But we insist that this interest is simply that of a second mortgagee.

a. It will not be claimed that the United States, in its contracts, is to be considered or deemed to have any superior rights and privileges to any other person. The usual principles that govern the relations of mortgagor, mortgagee, and the State authority, govern in this case as in any other. *Dugan, et al., Exrs., vs. United States, 3d Wheaton, 172. United States vs. Tingey, 5 Peters, 115.*

b. It will further be admitted that the Pacific Railroad Bill did not attempt to create the Union Pacific Railway Company, Eastern Division, defendant herein, but recognized its existence under the laws of Kansas, and entered into certain contract relations with it. Sec. 9, ch. 120, 12 U. S. Statutes at Large.

Those contract relations, which are vital to this discussion, are:

1st. The loan to the Company by the United States of its bonds at the rate of sixteen thousand dollars per mile, and the creation thereby of a mortgage and summary method of enforcing the mortgage, in case of failure to pay the bonds loaned, as to such property as may remain in the possession of the railroad corporation, at time of failure to pay the bonds. Section 5.

2d. A further contract is made with the Company, giving to the United States a preference in the use of the telegraph and railroad of the Railway Company, for such purposes as the Government may need, at the same rate of compensation as private persons pay the Company. Section 6.

3d. In case of failure to build the road from the Missouri River to Sacramento River by July 1st, 1876, the property in question is to be forfeited to the United States. Section 17. But this cannot apply to the defendant Railway Company, since it is obviated by section seven of the amendatory act.

4th. Congress retains the right to alter, amend, or repeal the act, having due regard to the rights of the Companies, and also having reference to the general object in the construction of the road, which was declared to be the promotion of the public interest and welfare, and to secure to the Government at all times, (but particularly in time of war,) the use and benefit of the telegraph and railroad, for postal, military and other purposes. Section 18.

5th. By the terms of the amendatory act to the Pacific R. R. Bill, approved July 2d, 1864, sec. 10, ch. 216, 13 U. S. Statutes at Large, Congress releases its first mortgage lien, as provided for in section five of the original act, and allows the Company to issue first mortgage bonds, equal in amount to those the Government holds, and it

is agreed in the record that this Company have actually issued these bonds.

THIRD.—OWNERSHIP.

From the above relations of this Company, it would appear clear that the title of the defendant, Railway Company, to the property in question, was undisputed by the United States.

1st. In law and in equity the mortgagor of real estate continues the owner thereof until foreclosure. *4 Kent Com. 182, 183 Marg., page 160-1 and note "a," p. 180, note "a;" Watkins vs. Gregory, 6 Blackf. 113; King vs. State Mutual Fire Ins. Co., 7 Cush. 7; Borst vs. Boyd. 3 Sandf., Ch. 501; 1 Hilliard on Mort. 154-5, 235, 389-90.*

2d. This is the more apparent in this case, from the fact that Congress in the tenth section of the amendatory act, authorizes the defendant Railway Company, to issue its first mortgage bonds upon the property in question, to which lien, that of the United States, mentioned and secured in section five of the original act, is declared "to be subordinate." From which the conclusion seems inevitable that the United States considered that the Railroad Company owned the property and could mortgage it, and that the General Government had nothing but a mortgage lien, which Congress proceeded to release.

3d. This contract *intended to be executed in the State of Kansas*, so far as the property in question is concerned, is a Kansas mortgage, and governed by the laws of the State of Kansas relating to mortgages. 1 *U. S. Stat. at Large*, 92 § 34, *Judiciary Act; Conkl. Tr.* 143; *Swift vs. Tysen*, 16 *Pet.* 1, 303; *Wilcox vs. Jackson*, 13 *Pet.* 517; *Carroll vs. Saff'd* 3 *How.* 462; *U. S. vs. Morrison* 4 *Pet.* 124.

The whole common law doctrine of mortgages has been in Kansas, by statute, swept away. *Chick vs. Willetts*, 2 *Kan.* 384.

Whatever rights the United States may have had under its mortgage, as provided for in section five of the original act, it is clear that they are "subordinate" to the lien of the first mortgage as permitted in section ten of the amendatory act. For it could hardly be seriously pressed that the second mortgagee had superior rights and remedies to the first, or that he has any privilege or franchise with respect to the mortgaged property greater than the other. For, if so, then is his security greater, prior to the one to which it is declared "subordinate."

If for any of the reasons set forth in the Pacific Railroad Act, or its amendatory acts, a right of action against the Railroad Company should inure to the United States, acting under due course of law in enforcing its lien, the General Government would have to begin as any other creditor, and foreclose its mortgage in some one of the forms known to equitable proceedings.

If, as the authorities just cited show, the *lex rei sitæ* governs, then the United States could not even take possession of the property, or bring ejectment for it until strict foreclosure.

But whatever remedy should be pursued, the law of Kansas as to the relation of the mortgagor and mortgagee to the mortgaged property, remains the true rule, and by that rule we still find the relation to be that of "owner" on the part of mortgagor, and lien-holder on the part of mortgagee.

4th. But it is not true that the laying of taxes on property that may fall to the United States by foreclosure or seizure, conflicts with the rights of the United States. For it is not certain that the Railroad Company will refuse or fail to discharge its obligations to the General Government. The presumption of law is, that every

contract will be observed, that contracts are made to be kept, not broken, that the Railroad Company will pay its bonds; will push its road westward as agreed; will carry government freight and transport troops just as it has promised.

The argument for the complainants proceeds on the ground of a contemplated breach of contract on the part of the Railroad Company. It is true the complainants say they cannot perform their obligations and pay taxes. But as paying taxes is the paramount duty of the Company, unless relieved therefrom by compact, the argument of the complainant goes to the extent of shielding the Company from any kind of pecuniary responsibility to third parties. The Company's train, through some negligence, is thrown from the track and a passenger is injured or killed. By a parity of argument, the company could refuse compensation for these injuries, on the ground that to do so would impoverish the Company, possibly to an extent that would prevent it from fulfilling its contract with the General Government.

Why does not the theory of the complainants completely absolve the Railroad Company from all connection with the state, except, perhaps, to ask the state courts to protect the property of the Company?

The complainants say that if you may tax, you may sell the property for taxes, and so destroy the lien of the United States.

This argument was very conclusively answered in Carroll *vs.* Safford, 3d Howard, 441. There the question arose whether land sold by the United States, but yet unpatented, could be taxed by the state. The court, in affirming that it could be taxed, says:

"Michigan does not warrant the title to land sold for

taxes. The deed, by the express words of the statute, when duly executed, may be given in evidence in the same manner, and with like effect, as a deed regularly acknowledged by the grantors. The government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale. But where there has been fraud or mistake the patent may be withheld, and every purchaser at a tax sale incurs the risk as to the validity of the title he purchases."

At the very most, all that can be said for the complainant's position, is that in case of failure on the part of the railroad corporation to respond to the Government, and by due process of law the property in question falls into the hands of the United States, then it would cease to be the subject of taxation. But this must follow on the same principle that property bid in by the Government at a sale on a judgment against sureties on a bond given by some defaulting Government officer, would also be withdrawn from State sovereignty.

Much stress is laid by complainants, on the powers given the United States, in sections five and seventeen of the original act, to seize the property in question in case of failure to "redeem" the bonds issued to it, or to carry the work westward as contemplated. Recent events have dissipated the argument founded on the last contingency, since the vast subsidies granted by the Government to these Pacific railroads have pushed their approaching lines toward each other at a rate of construction hitherto unknown in the history of railroad building. There can be no pretence that the last contingency can happen.

As to the other contingency, the argument of the complainants still is based on the apprehended breach of faith on the part of the Company. But it will be observed that this right of seizure, extends only to such

of the property in question, including lands granted to the Company, as shall remain "in the ownership of said Company."

If the Company shall have parted with its property, either voluntarily, or by legal process, before the United States should proceed to exercise its right of seizure, of course there would be nothing for this reserved power to act upon.

But no presumption can be made that the Company will fail to redeem its bonds; at least, such an exigency cannot be suggested by these complainants, who represent so largely the corporate franchises.

5th. It is conceded that Kansas cannot tax the "means" used by the General Government to carry on its operations. But what is included in this prohibition? If we seek for the meaning of Chief Justice Marshall in laying down the principle, we are not left in doubt. He was considering the legality of a State tax on the operations of a corporation, a bank created by the United States, to carry out its unquestionable powers. That he considered the rule he was establishing as applicable only to such "means" as owed their origin and continuance to the federal authority—which were created solely for national uses, and were employed to carry out the operations of the supreme authority, is manifest.

The very fundamental truths which he lays down as the basis of the rule clearly show this. These truths he defines on page 426, as follows:

"That a power to create, implies a power to preserve. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and preserve. That where this supremacy exists, that authority which is supreme must control, not yield, to that over which it is supreme."

The power to create a corporation to assist the General Government in maintaining its authority being conceded, it follows conclusively that the workings, the operations of this corporation can not be taxed. Yet by the same great authority, page 436, we are assured that not only is the real estate of the bank liable to taxation in common with the other real property in the State, but also, the stock held by citizens of the State in the bank.

The property of a corporation created by Congress, is liable to taxation, but where that corporation exists for the uses of the United States, its operations in that respect are freed from State taxation. This seems to be the limitation; but it can be carried no further. If these "means" consist in property owned by the United States, or in evidences of debt issued upon its faith and promise, the States may not tax. Beyond this neither principle nor authority leads us.

If the defendant corporation could claim itself to be a "means" created by the United States for its use, yet would its property be liable to taxation for State purposes. How much more is this so, when it is admitted that not only is it the creation of State authority, but its property and franchises are used entirely for purposes of private gain?

No priority is given to the United States in the use of the property of the Railway Company over any other customer, save, in case of inability to serve all, the freight and passengers of the United States shall be first transported. But such a contract with the Company falls far short of converting its corporate property and franchises into a "means" created and used by the United States for its own benefit. As well might the contractor who has agreed to carry Government freight across the plains insist that his agreement to carry goods

for the United States alone, exempt his train from State taxation.

6th. The case of Searight *vs.* Stokes, 3d Howard, 151, sheds some light upon the present inquiry.

It seems the United States, with consent of the State of Pennsylvania, at great expense built the Cumberland road through that State, and afterwards surrendered the road to the State, with the stipulation on the part of the State "That no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States," &c. Subsequently the State laid a toll on wagons bearing the mail, and it was held by a divided Court that the State could not do this, in consequence of her compact above recited.

The exemption from taxation is put solely on the ground of the agreement of the State not to receive toll from carriages laden with the property of the United States, and a majority of the Court thought the mail was property of the United States, a conclusion vigorously combatted by Justice McLean.

Now here was a gift by the United States to Pennsylvania, of a road built exclusively by the federal authority, yet it was admitted that this of itself gave the property of the United States, passing over the road, no exemption from State imposition in common with other property; it was only saved therefrom by the State's compact.

One can hardly think that the Court would have seriously considered valid an argument for the exemption of all property exployed by contractors not actually used for transporting Government property, on the ground that to collect toll from such property was preventing its owners from carrying the mails and other property

of the United States over the road, or at least jeopardizing their ability so to do.

Of course, taxing a vehicle for passing over a road, as effectually clogs the use of the road as a tax on the road itself.

But the majority of the Court did not for a moment claim that the road was a "means" or "instrument" of the United States, although its property had free transit over it, while Justice McLean expressly denies it.

The argument on both sides conceded the completest sovereignty of the State, except as it was limited by its own deliberate compact.

If the State of Kansas raised its revenues, so far as railroads are concerned, by imposing a tax on each trip of every car on the road, although some of these cars should bear the troops and property of the United States, yet the reasoning in Searight *vs.* Stokes would sustain the tax.

But against such a toll a much stronger argument can be raised than against the right of the State to tax equally the defendant Railway Company and all other persons in the State.

7th. One of the clearest tests as to what is to be considered a "means" of the General Government, and what is not, is suggested by Chief Justice Marshall in Osborn *vs.* United States Bank, 9 Wheaton, 738. He says, page 859, that when a corporation is shown "to have been originated for the management of an individual concern, to be founded on contracts between individuals having private trade and private profit for its great and principal object," the conclusion that the State has the right to tax such a corporation is "inevitable."

"This mere private corporation," he proceeds, "engaged in its own business with its own views, would

certainly be subject to the taxing power of the State as any individual would be; and the casual circumstance of its being employed by the Government in its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner."

In what essential respect does this defendant Railroad Corporation differ from the one suggested by Chief Justice Marshall?

8th. The case at bar, though very important in itself, both on account of the gravity of the principles involved and of the amount of property sought to be withdrawn from bearing its proportion of State burdens, is still more important in its ultimate grasp.

For not only will it decide as to the taxability of all the corporate property of the Union Pacific Railroad, and those branches receiving Government loans and grants by the legislation of 1862, but it really touches that vast system of railways, which have been aided by Government grants of land, beginning with the grant to the different States under the act of Congress, approved September 4th, 1841. *8th Section of Ch. 16, page 455; 5th U. S. Statutes at large.*

It is provided in section nine of this act, that the railways aided by this grant, "shall be free for the transportation of the United States mail and munitions of war, and for the passage of their troops without the payment of any toll whatever."

The act of Congress approved September 20th, 1850, (*Chapter 62, 9th U. S. Statutes at large,*) grants an immense body of land to the State of Illinois to aid in the construction of what is now known as the Illinois Central Railroad.

The fourth section of the act stipulates as follows: "And the said railroad and branches, shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

This stipulation is substantially repeated in the various subsequent acts of Congress, granting lands for railroad purposes.

Upon this reservation it is easy to build an argument for the exemption of all corporate property brought into existence by these grants from State taxation, stronger and more imposing than that erected by the complainants in this suit.

The power to tax concedes the power to sell, to give title, to destroy, so runs this reasoning, and so this reservation to the General Government of these railroads as public highways forever, free to the use of the United States without toll, would be perilled, possibly entirely defeated, were the States allowed to lay taxes on them.

In the case at bar, the Government has to pay for services rendered to it by the defendant Railway Company, as any other patron of the road, while all these other roads are required to be open to the United States for the transportation of its property free of charge.

The fact that these corporations, whose interests are guided by men of unsurpassed vigilance, have not only never claimed exemption from State control, but have constantly borne their proportion of State burdens, shows a contemporaneous construction of these beneficial acts of Congress by the railroad community, which ought to have great weight in determining how the complainants and the defendant Railway Company, as well as Con-

gress intended the grants and loans in the case before the court, should be construed.

Tried by any test we conclude that the property of this defendant corporation is its own, that it is under its control, that it is not "means" created and used by the General Government for its own purposes.

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